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No. 87-589

In the Supreme Court of the United States

OCTOBER TERM, 1987

RALPH G. FAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in declining to sever the mail fraud charges against petitioner from the witness intimidation charges.

2. Whether the evidence was sufficient to support petitioner's mail fraud convictions.

3. Whether the best evidence rule precluded live testimony about the contents of a conversation that had also been tape recorded.

4. Whether the evidence was sufficient to support petitioner's witness intimidation conviction.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Carpenter v. *United States*, No. 86-422 (Nov. 16, 1987)	4
McNally v. *United States*, No. 86-234 (June 24, 1987)	4, 5
R & R Assocs. v. *Visual Scene, Inc.*, 726 F.2d 36 (1st Cir. 1984)	6
United States v. *Davis*, 752 F.2d 963 (5th Cir. 1985)	3
United States v. *Runnels*, No. 86-1922 (6th Cir. Oct. 19, 1987)	5

Statutes and rules:

18 U.S.C. 875(b)	1
18 U.S.C. 1341	1
18 U.S.C. 1512(a)	1
Fed. R. Crim. P.:	
Rule 8	3
Rule 8(a)	3
Rule 14	3
Fed. R. Evid. 1002	5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 821 F.2d 1002.

JURISDICTION

The judgment of the court of appeals (Pet. App. A27-A28) was entered on June 30, 1987, and a rehearing petition was denied on August 10, 1987 (Pet. App. A29-A30). The petition for a writ of certiorari was filed on October 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on nine counts of mail fraud (18 U.S.C. 1341), one count of intimidating a witness (18 U.S.C. 1512(a)), and one count of transmitting in interstate commerce a communication containing a threat of injury (18 U.S.C.

875(b)). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A26).

Petitioner owned two corporations that leased boats to offshore oil drilling companies. Donald Riley was manager of drilling for the Texoma Production Company, which performed offshore drilling work. Petitioner and Riley agreed to a scheme under which petitioner paid Riley $100 a day for each boat that Texoma leased from petitioner's companies. Between August 1981 and May 1983 Riley received $165,000 in kickbacks from petitioner. After Texoma fired Riley for an unrelated impropriety, it discovered the kickback scheme and filed a federal civil action against petitioner and others. Pet. App. A2-A4.

In the fall of 1984, petitioner became concerned that Riley would testify against him in Texoma's civil action. Petitioner several times told a friend, Thomas Woolsey, of these concerns, and said that a "no-show" by Riley at the civil trial would be worth $20,000. On December 26, 1984, Woolsey went to Riley's home while he was away and threatened Riley's wife and daughter. Woolsey spoke to Riley over the telephone from Riley's home, both threatening to kill him and attempting to bribe him not to testify. Woolsey then telephoned petitioner from the Riley home and said that he thought that he could prevent Riley's testimony through bribery rather than "more drastic" means. Riley contacted the FBI, agreed to record telephone calls from Woolsey, and recorded calls from him on December 28 and 30. Petitioner subsequently told Woolsey to have nothing further to do with Riley, because petitioner suspected that Riley was cooperating with the government. Pet. App. A4-A5.

Prior to trial, petitioner moved to sever the mail fraud counts against him from the witness intimidation counts, but the district court denied the motion. Riley pleaded guilty to mail fraud charges and Woolsey pleaded guilty to

witness intimidation charges. Both testified for the government at petitioner's trial. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A26).

ARGUMENT

1. Petitioner first contends (Pet. 9-13) that he should have had two trials. He argues that the mail fraud and witness intimidation offenses were improperly joined under Fed. R. Crim. P. 8(a) and that the trial court abused its discretion under Fed. R. Crim. P. 14 by declining to sever the charges. The court of appeals properly rejected these arguments (Pet. App. A6-A8). As that court observed, petitioner's attempts to intimidate Riley were part of his efforts to conceal the fraudulent kickback scheme. The charges were therefore based on transactions that were "connected together" and were part of a "common scheme or plan" (Fed. R. Crim. P. 8(a)). Joinder was thus proper under Rule 8. *United States* v. *Davis,* 752 F.2d 963, 972 (5th Cir. 1985).

The trial court also did not abuse its discretion under Rule 14 by declining to sever the mail fraud counts from the other charges. Prior to and during the trial, petitioner argued only that he would be prejudiced by a trial on all counts because the jury would think worse of him if the mail fraud and the witness intimidation counts were tried together. As the court of appeals concluded, however, evidence pertaining to all of the charges would have been admissible at both separate trials: evidence of the fraud would have been admissible at a trial on the witness intimidation counts to show petitioner's motive for engaging in witness intimidation, and evidence of the intimidation would have been admissible at a trial on the mail fraud counts to show petitioner's guilty knowledge. Pet. App. A8. Only after trial did petitioner make the argument he now stresses, that he wanted to testify at a trial on the witness intimidation counts but not at a trial on the mail

fraud counts. As the court of appeals stated, "[t]his is simply too late" (*ibid.*). Petitioner waived that argument by not raising it until after trial.

2. Petitioner next contends (Pet. 13-19), relying primarily on *McNally* v. *United States*, No. 86-234 (June 24, 1987), that the evidence did not support his mail fraud convictions. The court of appeals correctly rejected that argument. In *McNally*, the Court held that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government" (*McNally*, slip op. 5). Such a scheme, the Court has stated, is "too ethereal in itself to fall within the protection of the mail fraud statute, which 'had its origin in the desire to protect individual property rights.' " *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), slip op. 6 (quoting *McNally*, slip op. 9 n.8). No such "ethereal" scheme was alleged here. Rather, as the court of appeals observed, this case involved a straightforward fraudulent scheme causing monetary harm to Texoma: "The kickback scheme deprived Texoma of economically material information regarding the amount [petitioner] would have accepted for his boats. Quite simply, if Riley had not violated his duty to disclose [that he was receiving kickbacks], Texoma might have captured for itself the large sums that Riley was secreting because Texoma would have known that [petitioner] was willing to lease his boats for less." Pet. App. A12-A13; see also *id.* at A15-A16 n.6. This Court recently reiterated in *Carpenter* that the mail fraud statute "reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises" (slip op. 7), and held that a conspiracy to trade on an employer's confidential business information is within the reach of the statute. In light of *Carpenter*, this case plainly involves a scheme that is proscribed by the mail fraud statute.[1]

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[1] Petitioner complains (Pet. 18-19) that this case was tried before the Court's decision in *McNally* was announced and states (without

3. Petitioner next argues (Pet. 19-21) that the trial court improperly allowed a deputy sheriff to testify about the substance of a conversation he had with petitioner when petitioner filed a complaint against Riley. Instead of permitting the deputy sheriff to testify about the conversation, petitioner argues, the court should have required the government to rely on a tape recording of that conversation. The procedure that was followed, petitioner contends, violated the best evidence rule, Fed. R. Evid. 1002. As the court of appeals noted (Pet. App. A11 n.1), this argument is completely without merit. The best evidence rule does not preclude the use of nondocumentary

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providing any examples) that the indictment and jury charge contained "intangible rights" language that is proscribed by *McNally* (see slip op.8). Whatever the merits of that claim, petitioner is hardly in a position to raise it, having failed to challenge the indictment or the jury instructions (which were not transcribed (see Pet. App. A11 n.2)) on appeal. In any event, any error was harmless since "a conviction based on an erroneous instruction may be affirmed if the jury necessarily found every factual predicate for a conviction under a proper theory." *United States* v. *Runnels*, No. 86-1922 (6th Cir. Oct. 19, 1987), slip op. 15. Here, the government's mail fraud theory was based entirely on the claim that petitioner had devised a scheme to obtain Texoma's business by paying kickbacks to Riley, and the jury necessarily found that such a scheme existed when it convicted petitioner on the mail fraud counts.

Petitioner also complains (Pet. 19) that the government sought to exclude evidence relating to petitioner's "good bargain" defense. There was no error. As the government's motion that is reprinted in the appendix to the petition (Pet. App. A31-A33) shows, what the government sought to exclude was evidence supporting a defense that petitioner's boats were leased to Texoma at a reasonable price. Whether or not that is true is irrelevant since, as the court of appeals explained, the fact that petitioner was willing to pay kickbacks to Riley showed that his companies would have been willing to charge less to lease their boats to Texoma in the absence of the kickback scheme. Thus, even if petitioner's rates were within the range generally charged for such boats, Texoma suffered a monetary loss on account of the fraudulent scheme.

evidence to prove an event, even though a documentary record of the event was made. See *R & R Assocs.* v. *Visual Scene, Inc.*, 726 F.2d 36, 38 (1st Cir. 1984). Since the government was trying to show the contents of the conversation and not the contents of the tape recording, it was not necessary to play the recording. In any event, petitioner could have used the recording in cross-examination or in his own case had he so desired, so he clearly was not prejudiced by the district court's ruling.

4. Finally, petitioner claims (Pet. 21-29) that there was insufficient evidence to show that he was responsible for Woolsey's threats to Riley. This argument ignores Woolsey's testimony that petitioner offered to pay him to obtain Riley's silence by any means, including murder (Pet. App. A4). It also ignores the fact that Woolsey spoke to petitioner from Riley's home during his December 26 visit there (*id.* at A4-A5), and it ignores the tape recordings of Woolsey's phone calls to Riley (*id.* at A22-A23), which showed that Woolsey was threatening Riley on petitioner's behalf in order to convince him not to testify in the civil case. As the court below concluded, from that evidence "[t]he jury could reasonably determine that [petitioner] had made known to Woolsey his willingness to pay $20,000 to anyone who would cause Riley not to testify, whether by violence or threats of violence or bribery, that [petitioner] had solicited Woolsey's assistance in effectuating this 'open offer,' and that he was in contact with Woolsey as Woolsey began his course of threats of violence against Riley commencing on December 26 and continuing on December 28 and 30" (*id.* at A24).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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